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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE QUESTION OF TRANSNATIONAL CORPORATIONS

Joint written statement* submitted by Centre Europe-Tiers Monde,
a non-governmental organization in general consultative status,
and the American Association of Jurists and Pax Romana,
non-governmental organizations in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31.

[6 July 2000]

* This written statement is issued, unedited, as received from the submitting non-governmental organizations.

THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE QUESTION OF TRANSNATIONAL CORPORATIONS

I. MANDATE OF THE WORKING GROUP. The Working Group of the Human Rights Sub-Commission on the working methods and activities of transnational corporations (resolution 1998/8) was given a six-point mandate, set out in a logical sequence, to enable it to complete successfully the task entrusted to it.

It is stressed that the Working Group needs to receive the necessary assistance so that it can carry out its mandate in full, which should start with the identification of the subject of its study (the methods, the activities and the problems) and conclude with the making of proposals and recommendations.

In 1999 the provisional agenda was drafted in such a way as to truncate the mandate and anticipate the views of the Working Group (document Sub.2/1999/WG.2/1). In fact, two fundamental activities that the Sub-Commission had entrusted to the Working Group had disappeared from the provisional agenda: to identify and examine the subject of its study and to make recommendations and proposals, which correspond to paragraphs (a) and (d) of Sub-Commission resolution 1998/8. The Working Group itself put the missing topics back on the agenda. Moreover, this provisional agenda included under item (d) two sub-items ((i) and (ii)) which gave precedence, as a solution to the problems to be considered by the Working Group, to voluntary codes of conduct drawn up by the transnational corporations themselves and to pseudo-inspections carried out by some NGOs or so-called NGOs or consultant companies, also transnational, engaged by the very corporations that are submitting to these inspections.

The secretariat of the Working Group is therefore urged to draw up the agenda for the Working Group's sessions in the year 2000 in accordance with the mandate given by the Sub-Commission, without anticipating the decisions to be taken by the Working Group.

II. NEED FOR THE WORKING GROUP TO IDENTIFY THE SUBJECT OF ITS STUDIES. The Working Group needs to identify the subject of its studies, which is on the one hand the transnational corporations as such and on the other hand the effects of their activities on human, civil, political, economic, social and cultural rights and the right to development. This implies a large-scale study in view of the wide range of activities of the transnational corporations covering the most varied and essential aspects of human life: work, food, health, education, culture, information, environment, social, political and recreational activities, etc.

A non-exhaustive list of the topics to be studied could comprise the effect of the activities of transnational corporations on:

(1) Labour law and the right to work;

(2) The right to information (to information in general and to scientific and technical information);

(3) The right to health (drugs, vaccines and the effects of the chemical and pharmaceutical industry in these areas);

(4) The right to natural resources (water, petroleum, etc.);

(5) The right to adequate and healthy food (e.g. genetically modified organisms);

(6) Biogenetics: can the genetic heritage and the genetic code be privatized?

(7) The right to national identity and culture;

(8) Civil and political rights;

(9) The influence of the transnational corporations on the United Nations system, the European Union and other intergovernmental organizations;

(10) The environment (polluting industries, toxic wastes, etc.);

(11) Women's rights;

(12) The rights of the child;

(13) The right of peoples to self-determination;

(14) Transnational corporations and financial capital. At present, the large transnational corporations are involved both in production activities and in speculative financial activities. This latter aspect basically takes two forms: one is the purchase of shares in such corporations by institutional investors, i.e. managers of pension funds, insurance company funds, etc., who then intervene in the decisions of the corporations in order to ensure that their investment produces the anticipated high income, even to the detriment of human rights. The close relationship can now be seen between the announcement of dismissals by a company and the immediate increase in the value of its shares based on the expectation of greater profitability. The other way in which the transnational corporations have entered the sphere of speculative financial capital is simply by investing part of their profits in speculation instead of in production.

(15) Closely related to the previous point is the issue of the relationship of the transnational corporations - as such or through their senior management - with financial crime, through the laundering of money derived from criminal activities such as drug trafficking, exploitation of prostitution, illegal arms trafficking, corruption of public and private officials, etc. Some judges and prosecutors specializing in this subject believe that a high proportion of large corporations are involved in financial crime and that almost all the offences committed go unpunished.[1]

(16) Finally, the role of the transnational corporations in political, economic and social corruption should be studied.[2]

III. NEED TO STUDY THE VARIOUS LEGAL ASPECTS. Analysis of the compatibility between the various international human rights instruments and the activities of the transnational corporations naturally raises the question of the legal framework in which the latter operate. For this purpose a number of basic premises need to be set out:

(1) National communities and the international community are communities subject to the rule of law, that is, they are established on legal foundations (national and international standards) that are binding on all persons, both natural and artificial, regardless of the extent to which these foundations are respected in practice.

(2) The transnational corporations are artificial persons and as such they are the subject and object of law. Thus the legal standards are also binding on the transnational corporations.

The managers of the transnational corporations are natural persons, and obviously the legal standards in force are also binding on them. The question therefore is to establish in what way the legal supervision of the transnational corporations and their managers is applied in terms of legal personality, applicable jurisdiction, civil and criminal liability, etc., so that the Working Group can make well-considered and well-founded proposals to the Sub-Commission. This may require the extension and possibly the widening of the Working Group's mandate.

IV. NEED TO RECOGNIZE THAT THE EXISTING STANDARDS ON HUMAN RIGHTS ARE BINDING ON THE TRANSNATIONAL CORPORATIONS AND TO STUDY THE POSSIBILITY OF DRAFTING SPECIFIC STANDARDS, ALSO OF A BINDING NATURE. There are many standards in force with peremptory force, either because they are binding (covenants, conventions, etc.) or because they form part of the jus cogens, which are universally applicable to human rights in general, to civil and political rights and to economic, social and cultural rights. These standards are certainly applicable without exception to the transnational corporations by virtue of the principle of equality before the law. The principal attempt to create a specific international legal framework that is binding on the transnational corporations (code of conduct and code on transfer of technology) have not been successful. There is only the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the International Labour Organization (the monitoring mechanisms of which need to be updated and strengthened) and a few other non-peremptory instruments.

An exception to this legal vacuum of binding standards, with specific reference to corporations, is the Convention on Discrimination against Women, article 2 (e) of which states: "... to take all appropriate measures to eliminate discrimination against women by any person, organization or ENTERPRISE" (emphasis supplied). And of course there is article 29 of the Universal Declaration of Human Rights which stipulates that "everyone" has duties to the community.

It is therefore appropriate to reconsider the possibility of introducing one or more compulsory codes of conduct for the transnational corporations, which could take the form of international conventions.

Experience has shown that the efficacy of voluntary codes of conduct is very limited and sometimes temporary and that in most cases the corporations adopt them basically for image reasons ("greenwash"), which may even help them to win new markets. In any case such codes cannot be a substitute for binding standards.[3]

It must be borne in mind, however, that there are other peremptory international instruments which, although they do not refer specifically to transnational corporations, deal with activities that are generally characteristic of such corporations. They are concerned mainly with the protection of the environment, and include the Rio Declaration of 1992, which has the force of jus cogens, the Basel Convention of 1989 and the Bamako Convention of 1991 on hazardous wastes and their transport and disposal, the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents, the 1993 Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (in which the civil liability of whoever carries out such activities is recognized), etc.

V. MECHANISMS FOR IMPLEMENTING THE STANDARDS. There are various mechanisms for monitoring and implementing the human rights standards, none of which is specifically designed for the transnational corporations, but which could play a role in that respect: the national courts, the committees of international covenants and conventions, the Inter-American Court of Human Rights, the European Court of Human Rights, the Luxembourg Court, the international courts of arbitration,[4] and the International Court of Justice which in 1993 created a Chamber for Environmental Matters.[5]

It is true that only States can be parties to some of these mechanisms, but that does not prevent States from answering for the activities of private persons who act within their jurisdiction or have their headquarters within their territory.

Some lawsuits against large transnational corporations are currently in progress in various national courts, for damage to the environment resulting in serious consequences for the health of the population and/or the health of the workers, for infringement of the principle of preventive measures, for financial offences, etc.[6]

Unfortunately, the Statute of the International Criminal Court approved in Rome in 1998, which established an important precedent by creating an international court for natural persons accused of certain serious offences, did not include artificial persons or offences against economic, social and cultural rights.

VI. MONITORING MECHANISMS IN THE FIELD OF THE COMMISSION ON HUMAN RIGHTS. Finally, the Working Group could propose monitoring mechanisms in the field of the Commission on Human Rights, which might consist in a working group of the Commission on transnational corporations, along the lines of the Working Groups on Enforced Disappearances and on Arbitrary Detention, or a special rapporteur.

VII. CONTRIBUTION BY THE NGOs. As a contribution to the fulfilment of the mandate of the Working Group, the American Association of Jurists, the Centre Europe-Tiers Monde and Pax Romana published a 150-page volume in July 2000 entitled "Sociétés transnationales et droits de l'homme" containing contributions on the subject by various authors.

Notes

[1] See: Eva Joly, "Notre affaire à tous", Les Arènes, Paris, June 2000, especially pp. 161, 174, 182-183, 202-205, 208 and 209. See also: "Noir, gris, blanc", Les cahiers de la sécurité intérieure No. 36, Institut des Hautes Études de la Sécurité Intérieure, La Documentation Française, Paris, 1999.

[2] Ibid.

[3] See the articles on the subject by Peter Utting and Alejandro Teitelbaum in "Sociétés transnationales et droits de l'homme", published by American Association of Jurists, Centre Europe-Tiers Monde (CETIM) and Pax Romana, Geneva, July 2000, 150 pp. See also: Peter Utting, "Business responsibility for sustainable development", UNRISD Occasional Paper 10, January 2000; and J. Diller, "A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives", in International Labour Review, 1999, No. 2, International Labour Office, Geneva.

[4] For example, there is the well-known arbitral award in the "Trail Smelter" case: liability directly includes that of the State where the activities are carried out and that of the enterprise conducting the harmful activity.

[5] See: "Prevención y sanción de las violaciones a los derechos ecónomicos, sociales y culturales y al derecho al desarrollo: el problema de la impunidad", 145 pp., published by American Association of Jurists and Centre Europe-Tiers Monde, Geneva, August 1998.

[6] Examples of such lawsuits are: in New York against Texaco (for environmental damage in Ecuador); before District 212 of the County Court of Galveston, Texas, against the manufacturers and users of a pesticide in the banana plantations of Costa Rica, Honduras and Nicaragua which caused the sterility of 1,500 workers: Shell Oil Company, Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Co., Dole Food Company, Inc., Dole Fresh Fruit Company, Chiquita Brands Inc. and Chiquita Brands International; in Brazil against Monsanto for the use of genetically modified soya in violation of the principle of precautionary measures; in India and the United States of America against Union Carbide for the Bhopal disaster; and in courts in Paris against the management of Eurotunnel and Elf for financial offences.